

APPENDIX B

Part I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part I continues to read as follows:

AUTHORITY: Secs. 4, 303, 409, 48 Stat. 1066, 1082, 1096, as amended, 47 U.S.C. 154, 303, 409.

2. Section 1.1200 is amended by revising paragraph (a) and deleting paragraph (b) to read as follows:

§ 1.1200 Introduction.

(a) **Purpose.** To ensure the fairness and integrity of its decision-making, the Commission has prescribed rules to regulate ex parte communications. These rules specify "exempt" proceedings, in which ex parte presentations may be freely made (§ 1.1204), "permit-but-disclose" proceedings, in which ex parte presentations are permissible but subject to certain disclosure requirements (§ 1.1206), and "restricted" proceedings in which ex parte presentations are generally prohibited (§ 1.1208). In all proceedings, certain periods ("the Sunshine Agenda or circulation period") are designated in which all communications with Commission decision-making personnel are prohibited (§ 1.1203). The limitations on ex parte presentations described above are subject to certain general exceptions set forth in § 1.1204. Where the public interest so requires in a particular proceeding, the Commission retains the discretion to modify the limitations on ex parte communications. Unless otherwise ordered by the Commission, Joint Boards may modify the ex parte rules in proceedings before them.

Note: * * * *

3. Section 1.1202 is amended by revising paragraphs (a), (b), (c), and (d) and deleting paragraphs (e) and (f) to read as follows:

§ 1.1202 Definitions.

For the purposes of this subpart, the following definitions apply:

(a) **Presentation.** A communication directed to the merits or outcome of a proceeding. Excluded from this term are communications which are inadvertently or casually made, and inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken. However, a status inquiry which states

or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, which states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved, or which otherwise is intended to address the merits or outcome or to influence the timing of a proceeding is a presentation.

Note: A communication expressing concern about administrative delay or expressing concern that a proceeding be resolved expeditiously will be treated as a status inquiry so long as no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay.

(b) *Ex parte presentations.* Any presentation which:

(1) if written, is not served on the parties to the proceeding; or

(2) if oral, is made without advance notice to the parties and without opportunity for them to be present.

Note: Written communications include electronic submissions transmitted in the form of texts, such as by Internet E-Mail.

(c) *Decision-making personnel.* Any member, officer, or employee of the Commission who is or may reasonably be expected to be involved in formulating a decision, rule, or order in a proceeding. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decisional-maker with respect to that proceeding. Thus, any person designated as part of a separate trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff shall be considered decision-making personnel with respect to decisions, rules, and order in which their Bureau or Office participates in enacting, preparing, or reviewing.

(d) *Parties.* Unless otherwise ordered by the Commission, in a proceeding other than a rulemaking, the following persons are parties:

(1) any person who files an application, waiver request, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person making a written submission regarding such filing which is served on the filer;

(2) any person who files a complaint which is served on the subject of the complaint or which is a formal complaint under 47 U.S.C. § 208, and the person who is the subject of the complaint; and

(3) the subject of an order to show cause, notice of apparent liability, notice of license modification, or similar notice or order, or tariff proceeding, or any other person who has otherwise been given formal party status in a proceeding.

Note: In a rulemaking proceeding or a proceeding before a Joint Board or before the Commission to consider the recommendation of a Joint Board, it is presumed for purposes of this subpart that all members of the public are parties.

Note: The fact that a person is deemed a party for purposes of this subpart does not constitute a determination that such person has satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or timeliness requirements otherwise set forth in the rules. Nor does it constitute a determination that such person has any other procedural rights, such as the right to intervene in hearing proceedings. The Commission may also determine in particular instances that persons who qualify as "parties" under § 1.1202(d) should not be deemed parties for purposes of this subpart.

4. Section 1.1203 is amended by revising paragraphs (a) and (b) and deleting paragraph (c) to read as follows:

§ 1.1203 Sunshine and circulation period prohibition.

(a) With respect to any Commission proceeding, all presentations to decision-makers concerning matters listed on a Sunshine Agenda or being considered on circulation, whether ex parte or not, are prohibited during the period prescribed in subsection (b) unless:

- (1) The presentation is exempt under § 1.1204(a);
- (2) The presentation relates to settlement negotiations and otherwise complies with any ex parte restrictions in this subpart;
- (3) The presentation is made by a member of Congress or his or her staff, or by other agencies or branches of the federal government or their staffs in a proceeding exempt under § 1.1204 or subject to permit-but-disclose requirements under § 1.1206. If the presentation is of substantial significance and clearly intended to affect the ultimate decision, the presentation (or, if oral, a summary of the presentation) must be placed in the record of the proceeding by Commission staff or in accordance with the procedures set forth in § 1.1206(d); or
- (4) The presentation occurs in the course of a widely-attended speech or panel discussion and concerns a Commission action that has been adopted.

(b) The prohibition set forth in subsection (a) applies during the following time period:

(1) For items listed for consideration on a Sunshine Agenda, from the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

(i) Releases the text of a decision or order relating to the matter,

(ii) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or

(iii) Issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.

(2) For items considered on circulation, from the time the Commission issues a news release indicating that it has adopted a decision or order relating to the matter, until the Commission releases the text of the decision or order.

5. Section 1.1204 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.1204 Exempt ex parte presentations.

(a) The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda and circulation period prohibition (§ 1.1203):

(1) The presentation is authorized by statute or by the Commission's rules, see, e.g., §§ 1.333(d), 1.415;

(2) The presentation is made by or to the General Counsel and his or her staff and concerns judicial review of a matter that has been decided by the Commission;

(3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, provided that, if the presentation is oral, a written summary of the presentation shall be filed within a reasonable time thereafter;

(4) The presentation involves a military or foreign affairs function of the United States or classified security information;

(5) The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share

jurisdiction;

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party;

(7) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by 47 U.S.C. § 331;

(8) The presentation is requested by the Commission or staff for the clarification or adduction of evidence, subject to the following limitations:

(i) this exemption does not apply to restricted proceedings designated for hearing;

(ii) in other restricted proceedings, any written presentation solicited upon such request or a summary of any oral presentation solicited upon such request shall promptly be served by the person making the presentation on the other parties to the proceeding. The Commission or its staff may waive the service requirement if service would be too burdensome because the parties are numerous or because the materials relating to such presentation are voluminous. If the service requirement is waived, copies of the presentation or summary shall be placed in the record of the proceeding and the Commission or its staff shall issue a public notice which states that copies of the presentation or summary are available for inspection. The Commission or its staff may determine that service or public notice would interfere with the effective conduct of an investigation and dispense with the service and public notice requirements;

(iii) if the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure must be made in accordance with the requirements of § 1.1206(d); provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement;

(iv) if the presentation is made in a proceeding subject to the sunshine or circulation period prohibition, disclosure must be made in accordance with the requirements of § 1.1206(d) or by other adequate means of notice that the Commission deems appropriate;

Note: If the Commission or its staff dispenses with the service

or notice requirement to avoid interference with an investigation, a determination will be made in the discretion of the Commission or its staff as to when and how disclosure should be made if necessary. See Amendment of Subpart H, Part I, 2 FCC Rcd 6053, 6054 ¶¶ 10-14 (1987).

(b) Ex parte presentations are permissible and need not be disclosed with respect to the following matters, unless the Commission, or the relevant Bureau of Office after consultation with the Office of General Counsel, finds by order or public notice that application of the reporting requirements of § 1.1206 would serve the public interest:

(1) a complaint proceeding in which the complaint is not served on the subject of the complaint (unless it is a formal complaint under 47 U.S.C. § 208); and

(2) notice of inquiry proceedings.

6. Section 1.1206 is amended by revising paragraphs (a)(1), (a)(2), and deleting paragraph (a)(3), redesignating paragraphs (a)(1), (a)(2), and (a)(3), as paragraphs (d)(1), (d)(2), and (d)(3), and adding new paragraphs (a), (b), and (c) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

(a) Unless a proceeding is restricted under § 1.1208 or the presentation is exempt under § 1.1204(a) or (b), ex parte presentations in any Commission proceeding by persons outside the Commission to decision-making personnel are subject to the disclosure requirements set forth in subsection (d) of this section; provided, however, that the requirements of this subsection may be waived where confidentiality is necessary to protect persons making ex parte presentations from possible reprisal.

(b) The disclosure requirements for ex parte presentations set forth in subsection (d) of this section become applicable and remain in effect until the proceeding is no longer subject to reconsideration or judicial review:

(1) in a rulemaking, upon the filing of a petition for rulemaking, the issuance of a notice of proposed rulemaking, a rulemaking order done without notice and comment (for purposes of subsequent reconsideration or review); or

(2) in any proceeding other than a rulemaking, whenever a person becomes a party to the proceeding, as defined by § 1.1202(d).

Note: The disclosure requirements of subsection (d) of this

section are potentially applicable after a filing initiating an adjudicatory proceeding (such as the filing of an application, waiver request, request for declaratory relief, or other filing seeking affirmative relief). However, the disclosure requirements only apply to ex parte presentations. Accordingly, presentations by a sole party to a proceeding would not be subject to the disclosure requirements of subsection (d) of this section because they would not be deemed ex parte presentations under § 1.1202(b).

Examples: After the filing of an uncontested application, the applicant would be the sole party to the proceeding. The applicant would have no other party to serve with any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined by § 1.1202(b) and would not have to be reported. On the other hand, in the example given, because the applicant is a party, a third person who wished to make a presentation to the Commission concerning the application would either have to serve the applicant or disclose any unserved presentations. Further, once the proceeding involved additional "parties" as defined by § 1.1202(d) (e.g., an opponent of the applicant who served the opposition on the applicant), the applicant and other parties would have to either serve the other or disclose any unserved presentations.

(c) Unless otherwise exempted under § 1.1204, presentations made by a member of Congress or his or her staff or by an agency or branch of the Federal Government or its staff, that are of substantial significance and clearly intended to affect the ultimate decision, shall be treated as ex parte presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with subsection (d).

(d) The following disclosure requirements apply:

(1) **Written presentations.** A person who makes a written ex parte presentation subject to this section shall, within three days of the presentation, submit two copies of the presentation to the Commission's secretary under separate cover for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that two copies have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies shall be filed for each proceeding.

(2) **Oral presentations.** A person who makes an oral ex parte presentation subject to this section shall, within three days of the presentation, submit to the Commission's Secretary, with copies to the Commissioners or Commission employees

involved, an original and one copy of a memorandum containing a concise summary of the entire content of the presentation, including the issues discussed, the positions taken, and all arguments and data presented. The memorandum (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or the original and one copy) shall be filed for each proceeding. If a Commissioner or Commission employee involved in the presentation believes that the memorandum does not adequately describe the presentation, he or she may request that the person file a supplemental memorandum or may file a memorandum for the record him- or herself.

(3) *Notice of ex parte presentations.* * * * *

Note 1: * * * *

Note 2: * * * *

8. Section 1.1208 is amended by revising paragraphs (a) and (b) and deleting paragraph (c) to read as follows:

§ 1.1208 Restricted proceedings.

(a) Ex parte presentations (except those which are exempt under § 1.1204) to or from decision-making personnel are prohibited:

(1) in any Commission proceeding in which there has been release of an order designating an evidentiary hearing before an administrative law judge or the full Commission. Persons having knowledge that, in a particular proceeding, a hearing designation order, show cause order, or other order designating a hearing is in preparation are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge;

(2) in any proceeding in which there has issued a public notice indicating the filing of mutually exclusive applications which are not subject to selection by auction or lottery. Persons initiating a presentation who have knowledge that mutually exclusive applications have been filed prior to the release of a public notice are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge; and

(3) in any Commission proceeding in which the Commission, or relevant Bureau of Office after consultation with the Office of General Counsel, determines that such ex parte presentations should be prohibited.

(b) Ex parte presentations are prohibited until the proceeding is no longer subject to reconsideration or judicial review.

§ 1.1210 Prohibition on solicitation of presentations. * * * *

9. Section 1.1212 is amended by revising paragraphs (a) through (h) to read as follows:

§ 1.1212 Procedures for handling of prohibited ex parte presentations.

(a) Commission personnel who believe that an oral presentation which is being made to them or is about to be made to them is prohibited shall promptly advise the person initiating the presentation that it is prohibited and shall terminate the discussion.

(b) Commission personnel who receive oral ex parte presentations which they believe are prohibited shall forward to the Office of General Counsel a statement containing the following information:

- (1) The name of the proceeding.
- (2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceeding.
- (3) The date and time of the presentation, its duration, and the circumstances under which it was made.
- (4) A brief summary of the substance of the presentation.
- (5) Whether the person making the presentation persisted in doing so after being advised that the presentation was prohibited.
- (6) The date and time that the statement was prepared.

(c) Commission personnel who receive written ex parte presentations which they believe are prohibited shall forward them to the Office of General Counsel. If the circumstances in which the presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Office of General Counsel with the presentation.

(d) Prohibited written ex parte presentations and all documentation relating to prohibited written and oral ex parte presentations shall be placed in a public file which shall be associated with but not made part of the record of the proceeding

to which the presentations pertain. Such materials may be considered in determining the merits of a restricted proceeding only if they are made part of the record.

(e) If the General Counsel determines that an ex parte presentation is prohibited by this subpart, he or she shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred and, if the public interest so requires, shall serve on the parties copies of the presentation (if written) and any statements describing the circumstances of the presentation. Service by the General Counsel shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If the General counsel determines that service on the parties would be unduly burdensome because the parties to the proceeding are numerous, he or she may issue a public notice in lieu of service. The public notice shall state that a prohibited presentation has been made and may also state that the presentation and related materials are available for public inspection.

(g) The General Counsel shall forward a copy of any statement describing the circumstances in which the prohibited ex parte presentation was made to the person who made the presentation. Within ten days thereafter, the person who made the presentation may file with the Office of General Counsel a sworn declaration regarding the presentation and the circumstances in which it was made. The General Counsel may serve copies of the sworn declaration on the parties to the proceeding.

(h) Where a restricted proceeding precipitates a substantial amount of correspondence from the general public, the above procedures will not be followed with respect to such correspondence. The correspondence will be placed in a public file and be made available for inspection.

10. Section 1.1214 is amended to read as follows:

§ 1.1214 Disclosure of information concerning violations of this subpart.

(a) Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.

(b) Any person who believes that his or her own intended action may be in violation of this subpart shall consult with the Office of General Counsel before taking the action.

11. Section 1.1216 is amended by revising paragraph (a) and deleting paragraph (d) to read as follows:

§ 1.1216 Sanctions.

(a) *Parties.* Upon notice and hearing, any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to report the facts and circumstances concerning any such violation as required by this subpart, may be disqualified from further participation in that proceeding. In proceedings other than a rulemaking, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate may also be imposed.

(b) *Commission personnel.* Commission personnel who violate provisions of this subpart shall be subject to disciplinary or other remedial action as provided in 47 C.F.R. § 19.735-107.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

February 7, 1995

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

**RE: IN THE MATTER OF AMENDMENT OF 47 C.F.R. SECTION 1.1200 *ET SEQ.*
CONCERNING EX PARTE PRESENTATIONS IN COMMISSION PROCEEDINGS**

In this Notice of Proposed Rulemaking, the Commission seeks comments on significant modifications to the Commission's Ex Parte Rules. Simplification and certainty in these rules will make it easier for the Commission to function in a fair and efficient manner regarding matters under consideration. Notwithstanding the effort to streamline the Ex Parte Rules by generally adopting the Administrative Procedural Act provisions on Ex Parte communications (5 U.S.C. Section 557(d)), multiple classifications and exceptions exist in the proposed modifications to the rules that I am concerned that confusion regarding compliance with the rules may continue. I look forward to comments that address how the Commission can further modify its Ex Parte Rules such that the Commission can effectively and efficiently conduct its business, without the weight of complexity inherent in the Ex Parte Rules which may inhibit dialogue regarding the issues pending before the Commission.

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Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 OFFICE OF THE SECRETARY

In the Matter of)
)
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Amendment of 47 C.F.R. § 1.1200)
et seq. Concerning Ex Parte)
Presentations in Commission)
Proceedings)

GC Docket No. 95-21

To: The Commission

COMMENTS OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

The Federal Communications Bar Association (the "FCBA" or "Association"), a non-profit, non-stock corporation organized under the laws of the District of Columbia in existence since 1936, by its undersigned representatives and in accordance with Section 1.415 of the Commission's Rules, hereby respectfully submits its Comments in response to the Notice of Proposed Rulemaking in this proceeding, FCC 95-52, adopted and released on February 7, 1995, 60 Fed. Reg. 8995 (February 16, 1995) (the "Notice").^{1/}

^{1/} These Comments are submitted in a timely fashion, in accordance with the Order of the Commission's General Counsel, DA 95-490, adopted March 13, 1995 and released March 15, 1995, which extended the date for filing comments in this proceeding to April 13, 1995.

1. The FCBA's membership consists of more than 2,400 communications lawyers and other professionals having an interest in the development of communications law and policy. As such, the Association and its members are vitally interested in the matters raised in the Notice. On a regular basis in the conduct of their profession, lawyers practicing before the Commission are called upon to counsel their clients with respect to compliance with the Commission's ex parte communications rules and to promote such compliance. Indeed, no other organization's membership is likely to be as significantly affected by the changes in those rules proposed in the Notice as is the FCBA's membership.^{2/}

2. The FCBA commends the Commission for its decision to revisit the ex parte communications rules. As the Notice recognizes, the last major rewriting of those rules occurred in 1987.^{3/} Experience accumulated under those rules during the last eight

^{2/} The views expressed in these Comments represent the views of a substantial majority of the members of the Executive Committee of the FCBA, its elected board of directors. One member of the Executive Committee, who is an employee of the Commission, did not participate in the discussion or consideration of these Comments or in the vote to authorize their filing with the Commission. The views expressed herein also represent the views of the FCBA's Ex Parte Rules Committee and are consistent with the views of most of the members of the Association who have responded to invitations in letters to the Association's chapters and substantive practice committees, at a monthly luncheon, and in the FCBA News, to advise the Chair of the Ex Parte Rules Committee of their views. These Comments do not, of course, necessarily represent the views of all members of the Association. The Executive Committee and the Chair of the Ex Parte Rules Committee have done the best that they could within the time permitted in the General Counsel's Order, footnote 1, supra, to ascertain a consensus in the views of the Association's membership and to reflect them in these Comments.

^{3/} Notice, at Para. 3 and n. 2.

years suggests that refinements to the rules can be made which will improve the manner in which the Commission dispatches its business, while preserving the public's need to have access to the agency's decision-making process and both the integrity and the appearance of integrity of that process.

3. The FCBA concurs in the Notice's view that the ex parte communications rules can be written and organized in a manner that makes them more "user-friendly." A format that avoids excessive cross-referencing to other rules in order to provide definitions or to establish exceptions to a rule, but that instead incorporates those definitions and exceptions within the body of the rule itself, is preferable to the current regulatory scheme, the cumbersomeness of which is acknowledged in the Notice. Id., at Paras. 10-13. ^{4/}

4. The FCBA supports the use of a "permit-but-disclose" regimen to govern the making of ex parte presentations in policy-oriented informal rulemaking proceedings. Notice, at Para. 23. It is not uncommonly the case that the important issues that may have to be decided in such proceedings have not been fully joined or refined in the process of filing opening comments and replies thereto. Following the close of the authorized comment-and-reply filing periods, the arguments of the parties may continue in a manner which sharpens the issues to be decided by the Commission, or which takes into account intervening technological, economic, or other developments. Allowing that

^{4/} The FCBA endorses the Notice's proposal to discard the misleading term "non-restricted proceeding" and to substitute in its stead the more accurate and plain-English term "permit-but-disclose proceeding."

debate to continue after the filing of reply comments, by means of "permit-but-disclose" presentations, will help the Commission to craft better-informed rules and policies than would be the case if ex parte communications were prohibited or unduly inhibited. The requirement that such presentations be disclosed on the record enables all parties to follow the progress of the argumentation and to rebut other parties' submissions, to the extent deemed necessary.

5. The Association submits that any oral ex parte presentation made in the course of a policy-oriented informal rulemaking proceeding should be disclosed in a written memorandum for inclusion in the record of the proceeding. However, the Association disagrees with the proposal in the Notice, at Para. 45, to require the presenter to prepare and submit an independent written summary of an oral ex parte presentation, if in fact the presentation merely repeated matters that have been previously submitted in writing on the presenter's behalf in that proceeding. In such instances, the presenter should be allowed simply to refer to the previous written submission and to state that the oral ex parte presentation was confined to matters reflected in that submission. There is no justification for putting a party to the labor and expense of writing out, in a "permit-but-disclose" memorandum, what that party has already written out and included in the record. Of course, in those instances when the oral ex parte presentation has included matters not contained in a previous written submission on the presenter's behalf in the proceeding, the presenter should be required to disclose in a written memorandum a summary of such matters for inclusion in the record.

6. The FCBA does not support the Notice's proposal to extend the "permit-but-disclose" procedure to adjudicatory or quasi-adjudicatory proceedings. Notice, at Paras. 19-22. In such proceedings, the Commission is called upon to exercise judicial or quasi-judicial functions in resolving conflicting claims of individual litigants. A procedure that would permit such litigants to make a personalized ex parte presentation to a Commission decision-maker -- with only the requirement that a sterile written summary of the presentation be prepared and filed -- would distort and compromise the adjudicatory process in several ways.

7. First, any response that could be made to an oral ex parte presentation in an adjudicatory or quasi-adjudicatory proceeding could never fully comprehend, and therefore could not respond to, precisely the argument or mode of argument that had been made in the presentation, particularly where the memorandum of the oral presentation was ambiguous or elliptical (albeit minimally complete). There would have been no opportunity to have observed the decision-maker's reaction to the oral ex parte presenter's arguments and delivery, and to craft a response specifically directed to that delivery and to that reaction. Indeed, the response cannot encompass all of the prior oral ex parte presentation, even in cases where the memorandum summarizing the presentation is relatively thorough, since by definition a summary is just that and will never completely render the whole of the presentation. Second, the decision-maker would typically be receiving the opposing oral ex parte presentations sequentially at points that may be substantially separated in time, with the obvious danger that the latest presentation

would be the one that would have the greatest impact. Third, ex parte presentations in adjudicatory and quasi-adjudicatory proceedings would inevitably color public perceptions of the Commission's processes and would undermine confidence in those processes. That result is by no means worth the marginal gains in administrative simplicity and clarity that might result from extending the "permit-but-disclose" procedures to adjudicatory and quasi-adjudicatory proceedings.

8. Finally, were the Commission to permit the argumentation to continue beyond the close of the authorized pleading cycle by means of "permit-but-disclose" ex parte presentations, the integrity of the authorized pleading cycle would be severely compromised. Thus, for example, a party whose principal objective in a given adjudicatory or quasi-adjudicatory matter is to foster delay for the purpose of maintaining the status quo as long as possible would have no incentive to include his or her best arguments within the confines of the authorized pleading cycle. Rather, such a party might choose to postpone the delivery of his or her most effective argument for post-pleading-cycle "permit-but-disclose" ex parte communications, on the theory that delay is most effectively promoted by deferring the point in time when the decisional issues are joined (and, perhaps, in the hope that the opposing party will not discover that the ex parte communication had been made and thus will leave the argument unrebutted).

9. Even if the delay-seeking litigant has made his or her most effective argument within the confines of the authorized pleading cycle, he or she could still

forestall the Commission's adjudication of the matter by repeatedly supplementing the record with colorably non-frivolous presentations made to Commission decision-makers, either orally or in writing, pursuant to a "permit-but-disclose" procedure. In those events, the costs to the parties of participating in contested adjudicatory and quasi-adjudicatory proceedings would rise, and the delay in obtaining final dispositions by the Commission would likewise increase. No apparent public interest would be served by such a procedure that cannot equally well be served by requiring parties in such proceedings -- when they feel a need to supplement the authorized pleadings -- to submit such supplementation in the form of a written presentation, accompanied by a motion for leave to submit the same outside of the authorized pleading cycle, and with service of copies of both supplement and motion upon all interested parties. ^{5/}

^{5/} In the event that the Commission should decide over these objections to extend "permit-but-disclose" procedures to adjudicatory and quasi-adjudicatory proceedings, the FCBA strongly urges the Commission to require that any written presentation, or any written memorandum disclosing an oral presentation, be promptly served by the maker of such presentation upon all interested parties and not simply filed with the Commission for inclusion in the record of the proceeding. Service by mail, facsimile, or hand delivery reliably ensures that other interested parties will have actual knowledge of the presentation. Mere submission of a written disclosure to the Commission for inclusion in the record of the proceeding would burden every interested party to maintain a continuing vigilance over every file involving a contested adjudicatory or quasi-adjudicatory proceeding, substantially driving up the cost of participating in such proceedings and running the risk that a clerical misfiling by Commission staff could deprive interested parties of actual knowledge of a merits presentation by an opponent. Furthermore, a delay in the filing by the Commission's staff of the memorandum summarizing an oral ex parte presentation might result in Commission disposition of the matter before other interested parties would even be aware that the presentation had been made. Under those circumstances, parties would be constrained to maintain an almost daily surveillance of the Commission's records in order to protect their interests, an unwarranted cost burden.

10. The FCBA recommends one modification to the existing ex parte communications rules governing adjudicatory or quasi-adjudicatory proceedings. The FCBA believes that parties should be permitted to make oral inquiries to Commission decision-making personnel in such proceedings concerning the status of the matter and a projected date for action by the Commission or its staff in the matter, without requiring advance notice to other interested parties and an opportunity for them to be present. Such inquiries should continue to be permissible so long as they are confined to (i) a legitimate query as to status and a projected date for disposition, or (ii) a request for prompt disposition based solely upon the age of the proceeding. Where, however, an inquiry includes an affirmative appeal to Commission decision-makers for action by a date certain, or refers to the particular circumstances of the case at hand as a basis for a request for prompt disposition,^{6/} then the party making such an appeal should be required to prepare a written memorandum of the substance of the conversation and serve copies upon all other interested parties. To that limited extent, a "permit-but-serve" regimen would be appropriate in adjudicatory and quasi-adjudicatory matters, inasmuch as other interested parties would receive actual notice that an appeal for Commission disposition, making reference to the specific circumstances of the matter, had been made

^{6/} For example, a party might wish to call to the Commission's attention the fact that contractual rights will expire on a given date in the future, that the party has an urgent need to be able to liquidate a property that cannot be sold without Commission consent in order to satisfy creditors or taxing authorities, or that delay in resolving a matter at the Commission is harming the interests of persons other than the parties to the proceeding, e.g., where such persons are depending upon the initiation of a service whose authorization is the subject of the proceeding.

to Commission decision-makers and any rebuttal, if warranted, could likewise be made on the record.

11. The FCBA submits that while the Commissioners, their staffs, and other decision-making personnel at the agency should retain discretion to meet or not to meet with interested parties in proceedings that are subject to "permit-but-disclose" procedures, Notice, at Para. 30, that discretion should never be exercised to refuse to meet with an interested party if a meeting was previously afforded to one or more other interested parties in the same proceeding. Fundamental fairness dictates that once the decision-maker has entertained a presentation in a matter, he or she should not decline presentations by others having an interest in, and a different position with respect to, the issues to be decided in that matter.

12. The Association endorses, with one modification and one caveat, the Notice's proposal to relieve both interested parties and Commission decision-making personnel appearing on public panels and at widely-attended seminars from the strictures of the ex parte communications rules during the so-called "Sunshine Period." Notice, at Para. 41. The FCBA would modify that proposal by extending the exemption from the ex parte communications rules to both passive attendance and active participation on the part of Commission decision-making personnel and interested parties at such panels, seminars, and sessions, whether during or outside of the Sunshine Period. See Notice, at Para. 42, n. 22. Under those circumstances, "permit-but-disclose" would not apply, and any presentations -- to the extent that they may be deemed to be "presentations" -- would be

exempt from the rules.¹⁷ As a caveat to that modification, the FCBA would extend that exemption only to actual attendance at and participation in the panel, seminar, or session at which one or more Commission decision-makers are present; the exemption would not extend, for example, to a merits presentation made to Commission decision-making personnel before or after the public part of the event or during the course of a multi-event meeting, convention, or trade show occurring outside of the panel, seminar, or meeting at which the decision-maker(s) is/are present.

13. The FCBA supports the Notice's proposal to extend to three days' time the period in which written memoranda disclosing the substance of oral presentations in "permit-but-disclose" proceedings may be submitted. Such an extension will afford parties the time needed to prepare a meaningful disclosure of what actually transpired in the course of the oral presentation.

14. Likewise, the FCBA welcomes the proposal in the Notice to require that, in situations where the permissibility of making an ex parte presentation is unclear, the party proposing to make the presentation must first alert the Office of the General Counsel. This cautionary approach will serve the interests of the public and its representatives, as well as the Commission, in helping to avoid inadvertent rule violations. The FCBA also supports the Notice's proposal to centralize in the General Counsel's

¹⁷ Consistent with the views expressed in Paragraphs 6 through 9, supra, this exemption should only apply to policy-oriented informal rule making proceedings and should not be available in adjudicatory or quasi-adjudicatory proceedings.

Office the responsibilities for administering, interpreting, and enforcing the ex parte communications rules.

15. In closing, the FCBA wishes again to commend the Commission for initiating this timely review of the ex parte communications rules and for affording an opportunity for comment thereon by the public, including those having an interest and desire to maintain both access to Commission decision-making and the fairness and the appearance of fairness of the Commission's processes.

Respectfully submitted,

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GENERAL

§1.1200 Introduction.

(a) *Purpose.* To ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process, the Commission has prescribed rules and regulations governing ex parte communications. These rules and regulations, which are designed to deter improper communications and maintain the utmost public confidence in Commission proceedings, specify standards of conduct and procedures to be followed with regard to ex parte presentations in Commission proceedings and provide for the imposition of sanctions for violations of these standards and procedures. Where the public interest so requires in a particular proceeding, the Commission retains the discretion to issue public notices setting forth modified or more stringent ex parte procedures.

(b) *General applicability.* These rules set forth the ex parte requirements that apply in various types of Commission proceedings. Following §1.1202 (Definitions), the rules describe three general classes of FCC proceedings. First, §1.1204(a) lists types of proceedings in which there are no ex parte restrictions. In these proceedings, parties and Commission decision makers may communicate freely, without regard to the prohibitions and disclosure requirements of these ex parte rules. Next, §1.1206(c) lists proceedings that are classified as "non-restricted." In non-restricted proceedings, parties and Commission decision-makers are permitted to engage in ex parte communications but certain disclosure requirements must be met. Finally, §1.1208(c) lists proceedings that are classified as "restricted." In restricted proceedings, ex parte communications

are generally prohibited. In all proceedings, including exempt proceedings, certain periods are set aside during which all communication with Commission personnel is prohibited. See § 1.1203. In addition, the prohibitions and requirements applicable to "restricted" and "non-restricted" proceedings are subject to certain general exceptions, which are listed in § 1.1204(b). Therefore, § 1.1204(b) should always be examined to determine whether a seemingly prohibited ex parte communication may be permissible.

NOTE: Inquiries concerning the propriety of ex parte communications should be directed to the Office of General Counsel.

§ 1.1202 Definitions.

(a) *Presentation.* Any communication directed to the merits or outcome of a proceeding. Excluded from this term is a communication which is inadvertently or casually made, or a communication which is an inquiry or request for information relating solely to the status of a proceeding. A status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing, of a proceeding is a presentation.

NOTE: Any congressional or other communication expressing concern with administrative delay in a particular proceeding or expressing concern that a particular proceeding be resolved expeditiously, will be treated as a status inquiry and therefore excluded from the definition of presentation. *Provided* That no view is expressed as to the merits or outcome of the proceeding; no view is expressed as to a date by which the proceeding should be resolved; and no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay.

(b) *Ex parte presentation.* Any presentation made to decision-making personnel but, in restricted proceedings, any presentation to or from decision-making personnel, which:

(1) If written, is not served on the parties to the proceeding, or

(2) If oral, is made without advance notice to the parties to the proceedings

and without opportunity for them to be present.

Comments and reply comments (including informal comments) filed prior to the expiration of the reply comment period, or, if the matter is on reconsideration, the reconsideration reply comment period, in informal rulemaking proceedings pursuant to §§ 1.415 and 1.419, but not in channel allotment rulemaking proceedings pursuant to § 1.420, are not considered ex parte presentations even if they are not served on other parties.

(c) *Decision-making personnel.* Any member, officer or employee of the Commission who is or may reasonably be expected to be involved in the decisional process in the proceeding. Unless otherwise specified, such persons usually include the Commissioners, their assistants, and other professional personnel of the Commission. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decision-maker with respect to that proceeding. Thus, any person designated as part of a separated trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff who may reasonably be expected to become involved in the decisional process of the proceeding shall be considered decision-making personnel.

NOTE: The application of this definition under this subpart is not intended to preclude the routine handling by Commission staff of complaints that would otherwise be technically considered ex parte because the person against whom the complaint is directed is also a party in a restricted proceeding.

(d) *Adjudicative proceeding.* Any proceeding, other than a rule making or a tariff proceeding involving future rates or practices, initiated upon the Commission's own motion or upon the filing of an application, a petition for special relief or waiver, or a complaint or similar pleading that involves the determination of rights and responsibilities of specific parties.

(e) *Formal opposition or formal complaint.* (1) A pleading opposing the grant of a particular application, waiver request, petition for special relief or